

Minutes from January 19, 2007 non-point workgroup meeting

9 VAC 25-820-10 et seq.

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The meeting was held at the Piedmont Regional Office in Glen Allen, Virginia and commenced at 12:30 PM. The following persons were in attendance:

Ricky Rash	VASCWD
Scott Reed	Earth Source Solutions/Chesapeake Bay Nutrient Land Trust
Shannon Varner	Troutman Sanders
Russ Baxter	DCR
Marian Moody	VASWCD
Stephen Aultman	VPI-SU
Molly Pugh	Virginia Corn Growers Association
Rick Parrish	Southern Environmental Law Center
John Sheehan	Aqualaw
Allan Brockenbrough	DEQ
Russ Perkinson	DCR
Bill Street	James River Association
Ed Overton	VASWCD
Mike Gerel	Chesapeake Bay Foundation
Kyle Winter	DEQ
Al Christopher	Virginia Clean Cities

Kyle Winter opened the meeting and initiated discussion on issues raised at the focus group meetings held with agricultural producers on December 7th, January 3rd and January 4th. While Senate Bill 1275 and 9 VAC 25-820 refer to nutrient trading between the permittee and a public or private entity acting on behalf of the landowner, most of the technical and administrative issues pertaining to the trading program would most likely be handled by the farmers that implement the source reductions that are to be traded. Consequently, most of the invited attendees were farmers who owned some (but not all) of the land they worked.

The focus group comments, where addressed, were approached by the work group along one of three lines:

- Does the comment simply reflect the cost of participating in the trading program?
- Does the comment identify an inherent issue that may restrict participation in the trading program?
- Can/should the focus group comment be addressed in the implementation guidance?

The work group's comment on these issues follows below:

- **Potential input costs and revenues to owners of land on which nutrient reductions are achieved to offset waste loads from new and expanding point source dischargers**

Questions about DEQ setting payment price to provide stability (it was explained that the intent was for the market to drive as much as possible; variability among agricultural producers would make it impossible to set one fair price)

This was somewhat a cost-of-doing business issue with the following points raised:

- *Landowners would have to avoid agreeing in advance to a contract that wasn't financially advantageous;*
- *Some farmers are considering a co-op to maintain some control over the land as well as the price structure;*
- *DEQ might use a reverse auction to obtain an initial supply of credits for sale through the WQIF; this would have the effect of setting the initial price;*

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- *The issue comes down to the choice of the landowner- what drives the use of the land (lifestyle choice or money)*
- *Pennsylvania's trading program doesn't allow the idling or conversion of productive agricultural land in order to generate nutrient reductions; Virginia could not impose a comparable restriction under the existing law and regulation.*

Would this prevent participation in other environmental trading programs (e.g., carbon sequestration, biodiversity)?

It would not. However, the guidance will need to outline how this would or would not be appropriate.

To what extent does participation in incentive programs affect eligibility (none, as long as the land owner's not receiving two payments for the same pound reduction)?

Same concern as the preceding comment, with the need to clarify in guidance how to reconcile the producer's status in achieving or going above the baseline. Nothing would prevent the producer from buying out the cost-share or incentive in order to participate in the trading program if such a decision made financial sense.

- **Potential demand for offsets (both from dischargers and from WQIF)**

Several questions about demand for offsets and when it will be sufficient to drive the market (in short term, DEQ will need to purchase reductions for WQIF to be able to sell credits/offsets, so some market will exist from outset).

Will the WQIF require longer term contracts in order to ensure dependability of supply? (this is something to address in guidance)

At least one basin (York) isn't subject to a lot of development (yet) and has a lot of wastewater plant capacity. Does this rule out the market in the York Basin (most likely in the near term)?

Not necessarily, as existing facilities in the York who waive their compliance schedules may need credits. As most of the relevant information will be posted online, producers may be able to anticipate the market demand to a limited degree.

Lack of knowledge on demand for and price of credits will limit interest in the agricultural community.

This is a valid point, to be addressed in outreach.

- **Previous experience of focus group participants with cost share/grant programs – what worked and what didn't**

Represents a great chance to do what isn't otherwise financially sensible but there's not enough money in the program and the cost figures don't account for O&M or the time value of adapting to new practices required by the program.

The farmers will need to focus on the existing demand for offsets or WQIF pounds; when they establish the price they want to charge for nutrient reductions, they'll be able to account for O&M and other issues germane to these practices.

The programs aren't necessarily practicable and require extensive advance planning that can't necessarily be followed through (change in crop prices change in crop needs of the farmer may result in changes to crop rotation; accessibility to fields during bad weather may also influence participation in programs).

Farmers who want to participate in the trading program will figure out the model for business; for example, it may be necessary for farmers to resort to annual nutrient management plans (or develop alternate job sheets for three-year plans) to be more flexible in adapting to changing circumstances.

Several comments were made regarding inconsistent interpretation/application of rules by government employees.

This should be addressed in guidance, with clear expectations as to the qualifications and responsibilities of inspectors.

Moral is that what's promised is >> what's delivered; problems are less with appeal of the program as much as the reality of little payoff.

The market should address this issue as the program evolves. No promises are being made about the amount of money to be made through the trading program.

- **Inventory of current level of BMP implementation, who paid (or is paying) for it and for how long;**

- Current degree of implementation varied but most respondents had some degree of cover crop, reduced tillage (or no-till) and nutrient management plans.
- Typically, if a tract of land had any BMPs, it was likely to have more than one, and it was not uncommon for focus group participants to have several BMPs on some tracts of land and no BMPs on others.
- Many installed BMPs (e.g., buffers, alternate water supplies and ponds) predated tributary strategies. Several questions asked about whether the offset program would be biased for or against pre-existing BMPs (the answer is that BMPs installed to current specifications will better position a farmer to participate, irrespective of when the BMPs were installed).
- Mix of cost-share, grants and own financing.

- **Verification of for how long the land will be under the control of the party implementing the BMP; what are perceived benefits/challenges of working with a landlord?**

Landlords will most likely be beneficiaries of this; the program is not good for farmers on year-to-year cash leases, and long-term leases are harder to get because of increasing real estate values and development pressure. Including requirements comparable to those in the CSP program might help the situation.

DEQ and DCR will investigate whether incorporating requirements comparable to the CSP's can be done in the guidance without changes to the statute or regulation.

Several farmers noted that landlords are likely to raise the rent in an amount commensurate with the perceived increase in revenue from the land; landlords without compelling interest in the crop would possibly instruct farmer whether (and how) to participate in nutrient trading without regard to whether that's beneficial or counterproductive to producer.

To some extent, this represents the cost of doing business and may not work in every landlord/renter situation. Outreach would certainly help here.

One farmer said “we’re farming the land because the landlords’ kids won’t”, and other expressed concerns that their tenure on the land would not outlive their landlord. What are currently contiguous tracts could be subdivided among the landlords’ descendents with mixed access to the land thereafter. While a good tenant was viewed as an asset to landlords, tenants on land that’s held by trusts or financial institutions don’t have much control over the land and may have one growing season’s notice to vacate. How could this program make the landowner more dependent on the producer? How could the lease agreements be developed to reflect this? The feasibility of doing this on rented land really comes down to why the landowner is holding on to his land; the intended use will drive what practices will be acceptable.

This concept is hard to define; again, this may be something producers need to consider before getting involved in the trading program.

We need a practical solution to this outside of regulations and guidance.

The guidance is bound by the regulation, which in turn is bound by statute. Again, outreach may be the best answer to this.

Who assumes the risk, the landowner or producer?

The landowner.

- **Evaluation of whether bringing level of BMP implementation up to baseline is worth the expense (and whether a requirement to do this on all land under the owner/operator’s control would preclude participation in the program); Several questions were raised about the applicability of baseline practices;**

Many farm ponds were installed as BMPs with federal \$\$\$ in years past; if these ponds serve primarily as sedimentation basins, how much sense does it make to fence them out? Some livestock (e.g., sheep) won’t go near flowing streams; why fence them out? If a 25’ buffer was fenced years ago and is well vegetated, it makes little sense for the farmer to either relocate the fence to 35’ (or for someone else to pay him to do it) if he’s only planning on selling reductions from cover cropping and reduced tillage.

There was some question as to the existing extent of BMP implementation (wider implementation of practices as opposed to structures), and whether cost share or incentive \$\$\$ could be directed toward those practices aren’t being implemented as widely. There was also a question whether the market would be capable of achieving this.

Will the baseline policy be subject to frequent revision (i.e., will the policy be unpredictable over the long term)? How were the pound reductions per acre calculated? How often will they be revised?

The baseline policy will probably be re-evaluated concurrent with new iterations of the Chesapeake Bay Model, with actual revisions occurring on a less frequent basis; likewise with the pound reduction calculations.

Regarding NMPs, how rigorously will they be enforced?

The better question would be how flexibly the NMPs should be written in order to account for changes on the farm.

What's the smallest amount of land that can be considered for this? (general agreement was a FSA tract would be considered the "contiguous unit")

The FSA tract remained the consensus choice for the "contiguous unit", with the proposal that the producer be required to "hold the line" regarding existing practices on other lands under his control, in order to reduce the possibility of "leakage" from other sites.

The baseline has got to be flexible, both with the nature of practices expected and approval of practices not on the baseline list, but which are known to achieve comparable nitrogen and phosphorus reductions (one proposal was to rethink the practices in terms of outcomes (pounds discharged from agricultural activity) as opposed to inputs (BMPs on the ground)

There was more discussion of the soil conditioning index or some other surrogate for nutrient reductions. However, any baseline calculation based on site-specific load reductions (as opposed to BMP implementation with assumed reductions occurring if the BMP was properly implemented) would require a sophisticated model.

What about liquid storage systems that aren't installed to meet a specific permit requirement or roofing/curb and gutters, rotational grazing and other practices? (a literature search may show agronomic benefit but little or negative water quality impact).

DEQ and DCR will discuss whether, and how, a protocol for reviewing site specific practices should be developed.

- **Negotiation of offset with VPDES permittee through aggregator, cooperative, SWCD (?), including liability issues and duration of contract: What would be the best way for a land owner to work with a third party such as an aggregator, cooperative or bank?**

What's in it for the aggregator? To what extent will the producer be shut out of the price negotiations?

A few comments were made in response to this:

- *Nothing prevents the producer from acting as the "public or private entity acting on behalf of the landowner";*
- *Producers should consider the cost of implementing the BMP before agreeing in advance to a contract that wasn't financially advantageous.*

Some participants liked the idea of having only private entities acting on behalf of the landowner, while some participants wanted to work through the local SWCD or some other cooperative arrangement.

Guidance for third parties is under development and should include credentialing of aggregators or other contractors (inspectors) acting for them; the guidance should be universal irrespective of the following factors:

- *The number and size of VPDES permittees purchasing load reductions;*
- *The number and size of landowners providing load reductions, and*

- *Whether the market in which the third party operates is closed (within a SWCD between a fixed number of parties) or open, and*
- *Whether the third party is a private individual or public (or private) aggregator*
- **Maintenance of BMPs, including record generation and retention and periodic inspection by DEQ or agent of DEQ; any concerns with inspection by regulatory agency?**

How much time will it take to maintain the paperwork associated with this program?

The paperwork will depend on the BMPs implemented.

On inspections; those producers with DEQ-issued permits reported good relationships with their inspectors but expressed concern with the ability of DEQ staff to accurately evaluate the implementation of a broad variety of BMPs (as opposed to lagoon inspections and NMP reviews).

What minimum qualifications should inspectors hold? NMPs should be verified by a certified planner; other BMPs will have to be reviewed to determine who is qualified to design/implement them. This would apply whether the inspector was a DEQ employee, a contractor working on behalf of DEQ or a third party inspector acting on behalf of the aggregator or VPDES permittee.

Will the inspection check sheets be standardized? Will farmers know what the inspectors are looking for in advance?

The guidance will contain check sheets that will be available on line.

How will biosecurity be maintained?

The guidance will state "Biosecurity will be maintained by inspectors or other personnel visiting an agricultural operation for the purpose of verifying the installation and performance of BMPs".

What assurance does the farmer have that the inspection will not be a pretense for a broader investigation?

Three possibilities exist here:

- *No assurance can be provided to the farmer, or*
- *DEQ staff are directed in the guidance to inspect only the BMP, or*
- *DEQ accepts third party verification for most inspections.*

Who's going to verify that something like an early cover crop was done right?

The inspector could be a DEQ employee, a contractor working on behalf of DEQ or a third party inspector acting on behalf of the aggregator or VPDES permittee. Apparently, this is not a difficult inspection to accomplish.

- **Evaluation of BMP performance at year's end (VPDES permittee has to report to DEQ by 2/1 that BMPs did their thing);**

On record keeping; the simpler the better.

Who's going to verify that something like an early cover crop was done right?

- **Resolution of situations in which BMP performance was either substandard or unverifiable (including acts of God).**

How do we deal with bad situations – not hurricanes or fires, but reasonably predictable (but unavoidable) situations such as heavy rains preventing early planting of cover crops, or farmers tearing up a wet field during harvest? (use an escrow account to hold the payment – permittee pays in, payment withdrawn only when BMP is authenticated, otherwise permittee can apply money elsewhere to obtain reductions).

How is risk managed – by the VPDES permittee, landowner, 3rd party?

Insurance?

What precedents can be noted in existing incentive programs?

What situations are predictable? Which are preventable?

The guidance will have to be clear in how force majeure is expressed.

- **Considerations for future outreach:**

- Very few of the participants were aware of the nutrient trading program before they were asked to participate in the focus group, and what information they had was anecdotal.
- Future outreach needs to be advertised in media, and through channels, that the farmers normally see – the legal ads of the weekly paper aren't it.
- While DEQ's doing what they can regarding this program, the advocates for the program need to come from quarters the agricultural producers are familiar with (SWCDs, extension etc.)
- More background on the program is absolutely necessary – don't assume the target audience has any familiarity with this.
- Collaborative outreach efforts – town hall meetings, County Commissioner facilitated meetings and meetings in informal places – with DEQ, DCR, SWCD is essential. Having key agency personnel work together later on may not be helpful...as the farmers want to see a “unified” presence of key players – DEQ for implementing the offsets and trading program, DCR for doing its part of NPS control and SWCD if asked to assist with implementation and/or evaluation of BMPs
- Being open to “multiple attributes/services” provided by the same parcel of land is critical, economically viable and administratively helpful for implementation of trading program.
- Link with Cooperative Extension to educate the farmers on this program.

The workgroup will need to establish a communications steering committee to address the above issues. While there's too much undecided to provide detailed information, some basic information about the program can, and should, be disseminated. Some options mentioned by the workgroup were:

- *Utilizing existing resources such as producers' conferences, the Old Dominion Electric Cooperative magazine, and agricultural industry newsletters, and*
- *Investigating whether WQIF money could be spent on outreach to agricultural producers*

The meeting was adjourned at 3:30 PM. The workgroup's next meeting is at the Piedmont Regional Office at 12:30 PM Friday, February 16, 2007.